

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES RUSSELL ORTH and JAMES RICHARD  
MILLER,

UNPUBLISHED  
October 1, 1999

Plaintiffs-Appellants,

v

No. 208678  
Wayne Circuit Court  
LC No. 96-619283 NI

JUAN PEDRO ANGULO and DONOVAN'S PUB,

Defendants-Appellees.

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Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

In this automobile negligence/dramshop action case, plaintiffs appeal as of right from the trial court's order granting defendant Donovan's Pub's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On the basis of the evidence then before it, the trial court properly granted defendant's motion for summary disposition. Although plaintiffs presented evidence to indicate that defendant Juan Angulo was intoxicated at the time of the accident, they presented no evidence to indicate that Angulo was visibly intoxicated while in defendant's bar. Hence, the evidence presented was insufficient to raise a genuine issue of material fact as to whether Angulo was visibly intoxicated at the time he was served alcohol by defendant. *Lasky v Baker*, 126 Mich App 524; 337 NW2d 561 (1983). Under these circumstances, summary disposition was properly granted in favor of defendant.

Plaintiffs' brief appears to invite us to consider, when determining whether the trial court erred in granting summary disposition, an affidavit from a police officer at the scene of the accident. Plaintiffs, however, did not submit the affidavit in conjunction with their brief opposing summary disposition. For this reason, we decline to consider it when deciding whether there existed genuine issue of material fact on which plaintiffs could bring their suit. Rather, we consider it only in the context of plaintiff's motion for relief from judgment under MCR 2.612(C)(1)(c). See *Charbeneau v Wayne County General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

After the trial court granted defendant's motion for summary disposition, plaintiffs moved for relief from judgment under MCR 2.612(C)(1)(c), which states in pertinent part:

On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

A trial court's decision to grant relief based on this court rule is discretionary and will not be disturbed absent an abuse of discretion. *Huber v Frankenmuth Mutual Ins Co*, 160 Mich App 568, 576; 408 NW2d 505 (1987). Here, plaintiff alleges that Angulo lied during his deposition when he said that he stopped at a friend's house on his way home from the pub. To support this allegation, plaintiffs produced an affidavit from a police officer at the scene of the accident, wherein the officer states that Angulo claimed to have come directly from the pub. The trial court found that the affidavit failed to establish facts from which a reasonable mind could find that Angulo committed fraud. Rather, the additional evidence merely established a factual scenario that is not entirely consistent with Angulo's deposition testimony. However, the trial court found that this contradictory evidence fell short of establishing that Angulo committed fraud, and nothing in the instant record suggests that the trial court abused its discretion in reaching this conclusion.

Affirmed.

/s/ William C. Whitbeck  
/s/ Henry William Saad  
/s/ Joel P. Hoekstra